

**N.D.A.G. Letter to Elkin (Feb. 4, 1988)**

February 4, 1988

Ms. Janet A. Elkin  
Secretary  
Public Service Commission  
State Capitol  
Bismarck, ND 58505

Dear Ms. Elkin:

Thank you for your letter of January 19, 1988, in which you request my opinion as to the legality of the proposed service contract enclosed with your letter by which the Public Service Commission (PSC) and other states' regulatory agencies retain the services of a private lawyer in Washington, D.C., to represent their interests in a gas price intervention action. Specifically, you inquire as to the legality of PSC's payment obligations under the contract in light of the pending litigation challenging the Emergency Commission's decision to transfer money from the state's contingency fund to the PSC so that it may intervene in this matter. Paragraph No. 7 of the contract makes the PSC's payment under the contract conditional upon the transfer of the state contingency funds in question.

State law clearly provides that it is unlawful for any public official to expend money beyond that which is legislatively appropriated.

54-16-03. Unlawful to expend more than appropriated -- May secure offer from commission for use of other funds -- Deficit void. No state officer, or board, commissioners, directors, or other officers having the control or management of any public institution of the state, or any state activity of enterprise, or having the responsibility of disbursing or expending any money appropriated by the state, shall expend, or agree or contract to expend in connection therewith any amount in excess of the sum appropriated therefor, or use an amount appropriated for any specific purpose or fund or for any other purpose without first having secured from the emergency commission an order duly made and entered authorizing such use of the fund. . . .

54-44.1-09. All expenditures must be appropriated. All expenditures of the state and all of its budget units of moneys drawn from the state treasury shall be made under authority of biennial appropriations acts which shall be based upon a budget as provided by law, and no money shall be drawn from the treasury, except by appropriation made by law as required by section 12 of article X of the Constitution of North Dakota.

In reviewing the Public Service Commission's Appropriations Act, 1987 N.D. Sess. Laws

ch. 70, § 1(10), the Legislature has appropriated \$50,000 for the costs associated with its gas price intervention. It is my understanding that the reason for PSC's request for contingency funds was the lack of an income source to support the \$50,000 appropriation authority. Although the lack of funds to support the \$50,000 appropriation might clearly affect the PSC in determining whether to expend money on the gas price intervention matter, this budgetary consideration does not affect the legality of the proposed payment of funds for which there exists appropriation authority. It merely entails expenditure cutbacks in other areas. Thus, irrespective of whether the transfer of funds from the state's contingency fund is ultimately effectuated, the PSC has appropriation authority to the extent of \$50,000 relative to costs incurred in its gas price intervention.

Even if there did not exist appropriation authority for the contemplated expenditures, it is my opinion that the proposed contract would not violate state law. If the pending litigation is resolved in favor of the Emergency Commission's decision to transfer state contingency funds to the PSC, the PSC would clearly be legally entitled to expend such funds in accordance with the Emergency Commission's order. A service contract that conditions PSC's payment obligations on the actual transfer of funds from the state's contingency fund does not obligate the PSC so as to violate state law.

In summary, there exists appropriation authority for the PSC to incur costs and contractual obligations relative to the gas price intervention action to the extent of \$50,000. Additionally, paragraph 7 of the contract conditions the PSC's payment obligations upon the actual transfer of funds from the state's contingency fund. It is my opinion, therefore, that the conditional payment obligations under the proposed contract would not violate state law.

It should also be noted that N.D.C.C. § 54-12-08 prohibits any state agency from retaining legal counsel except upon appointment by the Attorney General. Although Mr. Roth was appointed as a special assistant attorney general in 1984 by my predecessor, it has been held that such an appointment terminates with the expiration of the term of the officer making the appointment. Hord v. State, 79 N.E. 916 (Ind. 1907) (the term of a special assistant attorney general expires at the close of the term of the appointing Attorney General.) In any event, I am in the process of notifying the special assistant attorneys general appointed by my predecessor that their appointments are no longer in effect. In order for the PSC to retain Mr. Roth as legal counsel, therefore, it is necessary that I appoint him as a special assistant attorney general and define the scope of his engagement.

Sincerely,

Nicholas J. Spaeth

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